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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5146

MICHAEL L. RUDOLPH,

Petitioner.

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF WISCONSIN

for RSD
BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question presented on this petition for writ of certiorari has not been satisfactorily stated by the petitioner. Respondent respectfully submits that the question fairly raised in this matter is as follows:

Whether reversible constitutional error was committed at petitioner's state court trial when testimony of a single instance of his silence in response to in-custody interrogation was introduced, but was immediately followed by an explanatory and cautionary instruction to the jury?

STATEMENT OF THE CASE

A concise statement of those facts material to consideration of the question presented can be found in the opinion of the Wisconsin Supreme Court in Rudolph v. State, St. No. 234 (March 2, 1976), a copy of which is appended to the petition for writ of certiorari.

Review of the Wisconsin Supreme Court's opinion will demonstrate, contrary to the impression created by petitioner's statement of facts, that only one instance of introduction of evidence as to petitioner's silence in response to in-custody interrogation was ever raised before that court on appeal.

ARGUMENT

THE DECISION OF THE WISCONSIN SUPREME COURT HOLDING THAT THE TRIAL COURT HAD GIVEN A SUFFICIENT CAUTIONARY INSTRUCTION IMMEDIATELY AFTER TRIAL TESTIMONY WAS ELICITED AS TO PETITIONER'S SILENCE DURING IN-CUSTODY INTERROGATION RAISES NO SUBSTANTIAL FEDERAL QUESTION.

The sole claim of constitutional error raised before the Wisconsin Supreme Court on petitioner's appeal from his arson and burglary convictions related to the state's introduction at trial of an investigating police officer's testimony that petitioner "didn't want to talk to me" when the officer attempted to interrogate the petitioner two days after his arrest. (State Appeal Record, R. 226.) Defense counsel had immediately objected to this testimony. The trial court's response was as follows:

"THE COURT: Oh, I think the jury is entitled to the explanation, the defendant is under no obligation to talk with the officer at all. The defendant was perfectly within his rights in refusing to talk to the officer." (State Appeal Record, R. 227.)

On his appeal to the state supreme court, petitioner argued both that the introduction of the officer's testimony was error, and that the trial court committed further error by failing to immediately instruct the jury to disregard the testimony. In its decision affirming petitioner's convictions, the Wisconsin Supreme Court described, and responded to, these issues in the following language:

"It is claimed that the trial court erred in failing to give a sufficient cautionary instruction after the prosecution brought out that the plaintiff in error had exercised his privilege against self-incrimination. . . . With respect to [this] issue, the trial court explained to the jury that the defendant was under no obligation to talk with the police officer and was within his rights in so refusing. We hold this is a sufficient cautionary instruction. . . ." State v. Rudolph, St. No. 234, at p. 3 (March 2, 1976).

Since inquiry into the sufficiency of a cautionary instruction to the jury would have been unnecessary if no error were present, it is clear that the Wisconsin Supreme Court presumed that the introduction of the officer's testimony was error. That implicit presumption was consistent with the position of the State of Wisconsin in the court below. At no time did the state attempt to justify or excuse the officer's testimony as to defendant's silence during custodial interrogation. It is clear, therefore, that the only issue which can be fairly raised from

the state supreme court's decision is whether that court was correct in concluding that the immediate jury admonition given by the trial court was sufficient to render the improper testimony harmless. Respondent submits that the Wisconsin Supreme Court was correct and, moreover, that its judgment in this respect presents no substantial federal question warranting the invocation of certiorari jurisdiction by this Court.

Petitioner's reliance upon this Court's decision in United States v. Hale, 422 U.S. 171 (1975), and Doyle v. Ohio, ____ U.S. ___, 96 S. Ct. 2240 (1976), is entirely misplaced. Unlike Hale and Doyle, there was in the present case no concerted effort by the state to construct defendant's silence during custodial interrogation into substantial proof of guilt. Nor was this a case where, in contravention of the more relevant decisions of this Court in Griffin v. California, 380 U.S. 609 (1965), and Miranda v. Arizona, 384 U.S. 436 (1966), the state was engaged in an intentional and systematic effort to "penalize an individual for exercising his Fifth Amendment privilege . . ." Miranda, 384 U.S. at 468, n. 37. Instead, there was in this case only one isolated improper reference to a criminal defendant's silence - only a solitary careless reference to that silence at one point on one page of a trial transcript in excess of 150 pages.

As this Court has carefully explained, the prejudice to a defendant which flows from evidence of invocation of his Fifth Amendment right to silence arises from the inherent ambiguity of such silence. Griffin, 380 U.S. at 614-615; Hale, 422 U.S. at 177; Doyle, 96 S. Ct. at 2244-2245. A defendant's silence during custodial interrogation may be the result of a myriad of factors, including nervousness, hostility, a proper reliance on the right to remain silent, or fear that his guilt may be revealed. The danger that

a jury might infer the last of these reasons as the cause of a defendant's silence is precisely the risk which this Court's decisions have sought to prevent. See Griffin, supra; Hale, supra.

In the present case, however, that danger was dissipated by the state trial court's immediate explanation to the jury that the petitioner was "under no obligation to talk with the officer" and "was perfectly within his rights in refusing to talk to the officer." (State Appeal Record, R. 227.) This immediate instruction dissolved the inherent ambiguity of petitioner's silence, and expressly informed the jury that there was but one reason for defendant's silence -- his entirely legitimate exercise of his constitutional right.

The Wisconsin Supreme Court was thus correct in holding that any error in the officer's mention of the petitioner's silence was rendered harmless by the trial judge's immediate cautionary action. This being the only decision of the state supreme court that may fairly be raised by petitioner before this Court, and there being no substantial federal question presented by the state court's application of the harmless error rule to this case, respondent submits that this case simply presents no issue meriting this Court's consideration.

CONCLUSION

Petitioner has failed to demonstrate any justification for the invocation of this Court's certiorari jurisdiction, much less the summary reversal of the state supreme court's judgment. The petition for writ of certiorari should be denied.

Respectfully submitted,

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